(5)

Supreme Court, U.S.
FILED
MAY 19 2003
OFFICE OF THE CLERK

No. 02-811

IN THE

# Supreme Court of the United States

OCTOBER TERM, 2003

---

JEFF GROH, Special Agent with the
Bureau of Alcohol, Tobacco, and Firearms,

*Petitioner,*

v.

JOSEPH R. RAMIREZ, JULIA L. RAMIREZ,
JOSHUA RAMIREZ, and REGINA RAMIREZ,

*Respondents.*

---

**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

---

## JOINT APPENDIX

---

W.G. GILBERT, III
*Counsel of Record*
15 South Idaho Street
P.O. Box 345
Dillon, Montana 59725
(406) 683-6116
*Counsel for Respondents*

RICHARD A. CORDRAY
*Counsel of Record*
4900 Grove City Road
Grove City, Ohio 43123
(614) 539-1661
*Counsel for Petitioner*

PETITION FOR WRIT OF CERTIORARI FILED NOVEMBER 22, 2002
CERTIORARI GRANTED MARCH 3, 2003

50 PP

## JOINT APPENDIX
## TABLE OF CONTENTS

PAGE


Chronological List of Relevant Docket Entries ..... 1

Complaint (Mar. 4, 1999) ..... 17

Judgment of the District Court (Oct. 20, 1999) ..... 30

Joint Brief of Appellees (excerpts) (Apr. 9, 2001) ..... 32

Order Granting Certiorari (Mar. 3, 2003) ..... 48

Opinion of the Court of Appeals
(July 25, 2002) ..... Pet. App. 1a

Order and Opinion of the District Court
(Oct. 14, 1999) ..... Pet. App. 13a

Search Warrant (Mar. 3, 1997) ..... Pet. App. 26a

Application and Affidavit for Search Warrant
(Mar. 3, 1997) ..... Pet. App. 28a

Letter from William K. Suter, Clerk of the Court
to Hon. Theodore B. Olson
(Oct. 11, 2002) ..... Pet. App. 36a

U.S. District Court
U.S. District Court of Montana (Butte)

CIVIL DOCKET FOR CASE #: 99-CV-17

Ramirez, et al v.
Butte-Silver Bow Cty, et al — Filed: 03/04/99
Assigned to:
Judge Sam E. Haddon — Jury demand: Plaintiff
Demand: $0,000 — Nature of Suit: 440
Lead Docket: None — Jurisdiction: Federal Question
Dkt# in other court: None

Cause: 42:1983 Civil Rights Act

| | | |
|---|---|---|
| 3/4/99 | 1 | COMPLAINT and JURY DEMAND (crm) [Entry date 03/08/99] |
| 5/3/99 | 2 | ANSWER by defendant John McPherson to [1-1] (crm) [Entry date 05/04/99] |
| 5/3/99 | 3 | ANSWER by defendant Joe Lee to [1-1] (crm) [Entry date 05/04/99] |
| 5/21/99 | 4 | PRELIMINARY Pre-trial Conference Order by Judge Donald W. Molloy PPT Statement due: 8/26/99 PreDiscovery Disclosure Stmt due: 7/15/99 ; Preliminary Pretrial Conf set for 2:30 9/2/99 (baw) [Entry date 05/24/99] |
| 6/14/99 | 5 | STATEMENT of uncontroverted facts by defendant Jeff Groh (baw) [Entry date 06/17/99] |
| 6/14/99 | 6 | MOTION by defendant Jeff Groh to dismiss, or in the alternative, for summary judgment (baw) [Entry date 06/17/99] |

| | | |
|---|---|---|
| 6/14/99 | 7 | MEMORANDUM/BRIEF by defendant Jeff Groh in support of motion to dismiss [6-1], of motion for summary judgment [6-2] (baw) [Entry date 06/17/99] |
| 6/28/99 | 8 | MOTION by plaintiff Joseph R. Ramirez, plaintiff Julia L. Ramirez, plaintiff Joshua Ramirez, plaintiff Regina Ramirez to extend time to 7/22/99 to file pla respm re [6-1], which is Fed deft's mtn to dismiss or in the alternative for sumjgm (crm) |
| 6/29/99 | 9 | ORDER by Judge Donald W. Molloy granting motion to extend time to 7/22/99 to file pla respm re [6-1], which is Fed deft's mtn to dismiss or in the alternative for sumjgm [8-1] and Fed Dfts are granted an extension of time to and including 8/13/99 to file any reply. (cc: all counsel) (mcn) [Entry date 06/30/99] |
| 7/14/99 | 13 | PREDISCOVERY DISCLOSURE STATEMENT by defendant Jeff Groh (baw) [Entry date 07/19/99] |
| 7/15/99 | 10 | PREDISCOVERY DISCLOSURE STATEMENT by defendant John McPherson (cpy on disk) (crm) [Entry date 07/16/99] |
| 7/15/99 | 11 | PREDISCOVERY DISCLOSURE STATEMENT by defendant Joe Lee (cpy on disk) (crm) [Entry date 07/16/99] |
| 7/16/99 | 12 | PREDISCOVERY DISCLOSURE STATEMENT by plaintiff Joseph R. Ramirez, plaintiff Julia L. Ramirez, plaintiff |



| | | |
|---|---|---|
| | | Joshua Ramirez, plaintiff Regina Ramirez (crm) |
| 7/23/99 | 14 | RESPONSE by plaintiff Joseph R. Ramirez, plaintiff Julia L. Ramirez, plaintiff Joshua Ramirez, plaintiff Regina Ramirez to motion to dismiss [6-1], to motion for summary judgment [6-2] (crm) |
| 7/23/99 | 15 | STATEMENT OF MATERIAL ISSUES OF FACT by plaintiff Joseph R. Ramirez, plaintiff Julia L. Ramirez, plaintiff Joshua Ramirez, plaintiff Regina Ramirez in re [6-1], in re [6-2] (crm) |
| 8/9/99 | 16 | PRELIMINARY PRETRIAL STATEMENT by plaintiffs (san) [Entry date 08/11/99] |
| 8/13/99 | 17 | REPLY by defendant Jeff Groh to response to motion to dismiss [6-1], motion for summary judgment [6-2] file delivered to: Judge Molloy (crm) [Entry date 08/16/99] |
| 8/16/99 | 18 | PRELIMINARY Pre-trial Conference Order by Judge Donald W. Molloy; Preliminary Pretrial Conf Reset for 1:30 9/29/99; all other conditions set forth in the Court's order of 5/18/99 are still in effect (baw) |
| 8/18/99 | 19 | ORDER by Judge Donald W. Molloy regarding [6-1], regarding [6-2]; in-court hearing/oral argument set for 1:00 9/9/99 with pptc to follow. (cc: all counsel) (mcn) [Entry date 08/19/99] |
| 8/20/99 | 20 | ORDER by Judge Donald W. Molloy Preliminary Pretrial Conference set |

following the in-court hearing set for 1:00 9/29/99 (cc: all counsel) (baw)

8/24/99 21 PRELIMINARY PRETRIAL STATEMENT by defendant John McPherson, defendant Joe Lee (with cpy on diskette) (crm) [Entry date 08/25/99]

8/24/99 22 PRELIMINARY PRETRIAL STATEMENT by defendant Butte-Silver Bow Cty (with cpy on diskette) (crm) [Entry date 08/25/99]

8/24/99 23 PREDISCOVERY DISCLOSURE STATEMENT by defendant Butte-Silver Bow Cty (with cpy on diskette) (crm) [Entry date 08/25/99]

8/24/99 24 ANSWER by defendant Butte-Silver Bow Cty complaint [1-1], (with cpy on diskette) (crm) [Entry date 08/25/99]

8/25/99 25 PRELIMINARY PRETRIAL STATEMENT by defendant Jeff Groh (mcn)

9/29/99 26 MINUTES: In-court hearing held 9/29/99; W.G. Gilbert and Vince Kozakiewicz for plf.; Deanne Sandholm for deft.; motion to dismiss or for summary judgment argued by Deanne Sandholm 1st; 1:35pm-Vince Kozakiewicz argues; 2:12pm-Deanne Sandholm responds; 2:17pm-recess for 10 minutes before PPTC in jury room before Judge Donald W. Molloy C/R: Daina Hodges (baw)



10/5/99 27 ATTORNEY APPEARANCE for plaintiff Joseph R. Ramirez, plaintiff Julia L. Ramirez, plaintiff Joshua Ramirez, plaintiff Regina Ramirez by W.G. Gilbert III (crm)

10/13/99 28 ORDER by Judge Donald W. Molloy; pretrial order ddl set for 10/25/00; Preliminary Pretrial Conference held on 9/29/99; final pretrial conference set for 11:00 11/1/00 in MSO; jury trial set for 1:00 11/13/00 in Butte; discovery ddl 6/2/00; motions ddl 7/5/00; discl of deft. damages experts-4/1/00; discl. of plf. damages experts 3/1/00 (cc: all counsel) (baw) [Entry date 10/15/99]

10/19/99 29 ORDER by Judge Donald W. Molloy granting motion to dismiss [6-1], granting motion for summary judgment [6-2] dismissing party Jeff Groh and does 26-50 with prejudice each party to bear its own costs. (cc: all counsel) (mcn) [Entry date 10/20/99]

10/20/99 30 JUDGMENT: in favor of the federal defendants and against the plaintiffs, each party to bear its own costs by Judge Donald W. Molloy (cc: all counsel) (mcn)

11/19/99 31 NOTICE OF APPEAL by plaintiff Joseph R. Ramirez, plaintiff Julia L. Ramirez, plaintiff Joshua Ramirez, plaintiff Regina Ramirez from Dist. Court decision [30-1] Fee Status/Amount $105.00 paid Receipt # 21797 (cc: all counsel) (crm) [Entry date 11/23/99]

| | | |
|---|---|---|
| 12/6/99 | 32 | TIME SCHEDULE ORDER from USCA. Appellant's brief: 03/06/99 Appellee's brief: 04/05/99 Appellant's reply: 04/20/99 (crm) |
| 2/29/00 | 33 | MANDATE Spread from Circuit Court of Appeals dismissing without prejudice the appeal [31-1] (crm) |
| 4/11/00 | 34 | MOTION by defendant John McPherson, defendant Joe Lee, defendant Butte-Silver Bow Cty for summary judgment. Red file to Melissa (crm) [Entry date 04/12/00] [Edit date 04/14/00] |
| 4/11/00 | 35 | MEMORANDUM/BRIEF by defendant John McPherson, defendant Joe Lee, defendant Butte-Silver Bow Cty in support of motion for summary judgment [34-1] (crm) [Entry date 04/12/00] |
| 4/11/00 | 36 | STATEMENT OF UNCONTROVERTED FACTS by defendant John McPherson, defendant Joe Lee, defendant Butte-Silver Bow Cty in support of [34-1] (crm) [Entry date 04/12/00] |
| 5/17/00 | 37 | RESPONSE by plaintiff Joseph R. Ramirez, plaintiff Julia L. Ramirez, plaintiff Joshua Ramirez, plaintiff Regina Ramirez to motion for summary judgment [34-1] (crm) |
| 5/17/00 | 38 | STATEMENT OF SUPPLEMENTAL UNCONTROVERTED FACTS by plaintiff Joseph R. Ramirez, plaintiff Julia L. Ramirez, plaintiff Joshua Ramirez, plaintiff Regina Ramirez in re [34-1], which is deft mtn for sumjgm (crm) |



| | | |
|---|---|---|
| 5/17/00 | 39 | LETTER of explanation of late filing of [37-1] and [38-1] from W.G. Gilbert, III for plaintiff Joseph R. Ramirez, plaintiff Julia L. Ramirez, plaintiff Joshua Ramirez, plaintiff Regina Ramirez (crm) |
| 5/23/00 | 40 | REPLY by defendant Butte-Silver Bow Cty, defendant John McPherson, defendant Joe Lee to response to motion for summary judgment [34-1] file delivered to: DWM (crm) [Entry date 05/24/00] |
| 9/27/00 | 41 | ORDER by Judge Donald W. Molloy granting motion for summary judgment [34-1] dismissing party Butte-Silver Bow Cty, party John McPherson, party Joe Lee, and dismissing case (cc: all counsel). (lll) [Entry date 09/28/00] |
| 9/27/00 | 42 | JUDGMENT: by Judge Donald W. Molloy regarding [41-3], finding in favor of Butte-Silver Bow County, Sheriff McPherson and Undersheriff Lee and against Plaintiffs, each party to bear its own costs (J/O Book Vol 38, Pg 52) (cc: all counsel). (lll) [Entry date 09/28/00] [Edit date 10/02/00] |
| 10/30/00 | 43 | REPRESENTATION STATEMENT identifying all parties to the action along with names addresses and telephone numbers of their respective counsel if any Ramirez, plaintiff Joshua Ramirez, plaintiff Julia L. Ramirez, plaintiff Joseph R. Ramirez (crm) [Entry date 11/01/00] |
| 10/30/00 | 44 | NOTICE OF APPEAL by plaintiff Regina Ramirez, plaintiff Joshua Ramirez, plaintiff Julia L. Ramirez, plaintiff Joseph R. |

Ramirez from Dist. Court decision [29-2], [30-1], [41-3], [42-1] Fee Status/Amount 105.00 paid Receipt # 29075 (cc: all counsel) (crm) [Entry date 11/01/00]

11/13/00 45 CERTIFIED COPY of Appellate Court Order: Appellants' notice of reinstatement is construed as a motion for reinstatement. So construed, the motion is granted. This appeal is reinstated. The briefing schedule is as follows: the opening brief and excerpts of record are due December 14, 2000, the answering brief is due January 16, 2001, and the optional reply brief is due 14 days from service of the answering brief (cc: all counsel) (crm) [Entry date 11/14/00] [Edit date 11/14/00]

11/14/00 46 TIME SCHEDULE ORDER from USCA. Appellant's brief: 02/15/01 Appellee's brief: 03/19/01 Appellant's reply: 04/02/01 (crm) [Entry date 11/15/00]

11/6/01 47 ATTORNEY SUBSTITUTION: terminating Deanne L. Sandholm and substituting attorney William W. Mercer (cc: USCA - Records Unit - 95 Seventh St - San Francisco CA 94103) (crm) [Entry date 11/07/01] [Edit date 11/07/01]

4/9/02 48 MANDATE Spread from Circuit Court of Appeals affirming in part and reversing in part decision of the District Court Appeal [44-1] (crm) [Entry date 04/10/02]

4/26/02 49 CERTIFIED COPY of Appellate Court Order: The mandate, having been issued prematurely, is hereby recalled (crm)



8/5/02 50 MANDATE Spread from Circuit Court of Appeals affirming in part and reversing in part decision of the District Court Appeal [31-1], [44-1] (crm) [Entry date 08/06/02]

10/28/02 51 ATTORNEY SUBSTITUTION: terminating attorney William W. Mercer for Jeff Groh and substituting attorney Timothy J. Cavan (crm) [Entry date 10/30/02]

10/30/02 53 ORDER by Judge Donald W. Molloy Case reassigned to Judge Carolyn S. Ostby (cc: all counsel) (crm) [Entry date 11/04/02]

10/31/02 52 ANSWER by defendant Jeff Groh complaint [1-1] (crm) [Entry date 11/01/02]

11/27/02 54 ORDER by Judge Donald W. Molloy regarding obj to USMJ, [0-1] Case reassigned to Judge Sam E. Haddon for all trial proceedings and entry of jgmt. (cc: all counsel) (ljm) [Entry date 12/02/02]

12/5/02 55 MAIL Returned [54-1], [54-2] addressed to plaintiff Regina Ramirez, plaintiff Joshua Ramirez, plaintiff Julia L. Ramirez, plaintiff Joseph R. Ramirez by cnsl Vincent Kozakiewicz; remailed to address on label from USPO-4535 S Five Mile Rd, Boise, ID 83709-4862 (rew) [Entry date 12/05/02]

12/17/02 56 ORDER by Judge Sam E. Haddon; status hearing set for 1:00 2/7/03 in Butte (cc: all counsel and C/C Butte) (ljm)

1/22/03 57 ORDER by Judge Sam E. Haddon; Status hearing set for 2/7/03 in VACATED and

RESET for status hearing on 2:00 2/28/03 in BUTTE MT ((fax to Clk/BU) cc all counsel) (lav)

3/13/03 58 ORDER by Judge Sam E. Haddon, U.S. Supreme Court granted Deft's Petition for Certiori on 3/3/03. Parties shall report to Court at least each 3 months on status of Supreme Court Appeal. First report filed no later than 5/12/03 (cc: all counsel) (ljm)



General Docket
US Court of Appeals for the Ninth Circuit

Court of Appeals Docket #: 00-35955 Filed 11/8/00
Nsuit: 3440 Other civil rights (Fed)
Ramirez, et al v. Butte-Silver Bow Cty, et al
Appeal from: District of Montana (Butte)

11/8/00 DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. CADS SENT (Y/N): N. setting schedule as follows: appellants' designation of RT is due 11/9/00; appellee's designation of RT is due 11/20/00; appellant shall order transcript by 11/29/00; court reporter shall file transcript in DC by 1/2/01; certificate of record shall be filed by 1/8/01; appellants' opening brief is due 2/15/01; appellees' brief is due 3/19/01; appellants' optional reply brief is due 14 days from service of the answering brief. [00-35955] (hh) [00-35955]

11/8/00 Filed Vincent J. Kozakiewicz for Appellants Regina Ramirez, et al., Civil Appeals Docketing Statement; served on 10/30/00 (to CONFATT) [00-35955] [00-35955] (hh) [00-35955]

12/18/00 Filed motion and deputy clerk order PROMO: (Deputy Clerk: cag) Aplts' motion to consolidate is GRANTED. Nos 99-36138 and 00-35955 shall proceed as consolidated appeals. The briefing schedule in no. 00-35955 shall govern both appeals. Court records do not currently reflect that the dc has issued the COR in nos. 99-36138 and 00-35955. Aplts shall monitor the

issuance of the certificate. (Motion recvd 12/12/00) [99-36138, 00-35955] (hh) [00-35955 99-36138]

12/27/00 Case rejected from Circuit Mediation Program. (sa)
[00-16505 99-16647 00-16714 00-16728 00-16914 00-16917 00-16937 00-16997 00-17034 00-17071 00-17112 00-17138 00-17146 00-17194 00-17203 00-17220 00-17234 00-17260 00-17274 00-17324 00-17341 00-17394 00-35814 00-35905 00-35916 00-35918 00-35924 00-35926 00-35955 00-35961 00-35989 00-35990 00-36010 00-36014 00-56466 00-56558 00-56561 00-56574 00-56581 00-56601 00-56666 00-56681 00-56715 00-56725 00-56735 00-56745 00-56754 00-56807 00-56912 00-56921 00-56929 00-56933 00-56953 00-57000 00-57050 00-57059 00-71138 00-71398]

2/16/01 Filed original and 15 copies Appellant Joseph R. Ramirez, Julia L. Ramirez, Joshua Ramirez, Regina Ramirez opening brief (Informal: n) 37 pages; 5 excerpts of record in 1 vol.; served on 2/13/01 (minor defcy: covers do not have consolidated case number) Notified counsel. [00-35955, 99-36138] (gar) [00-35955 99-36138]

3/5/01 Received Appellants Joseph R. Ramirez, et al., satisfaction of (minor) brief deficiency (corrected covers for brfs and excs). (RECORDS) [99-36138, 00-35955] (hh) [00-35955 99-36138]



3/12/01 Filed notice of joint brief of Appellees Jeff Groh, et al., Briefing schedule is now as follows: appellees' brief due 4/9/01; optional reply brief is due 14 days from service of the aples' brief. Five additional pages or 1,400 words are authorized for aplee(s) only. (CASEFILE) [99-36138, 00-35955] (hh) [00-35955 99-36138]

4/10/01 Filed original and 15 copies appellee Jeff Groh, Butte-Silver Bow Cty 47 pages brief, 0 Exc. vols:; served on 4/9/01 [99-36138, 00-35955] (crw) [00-35955 99-36138]

4/27/01 Filed original and 15 copies aplts Joseph R. Ramirez, et al., reply brief, (Informal: n) 16 pages; served on 4/23/01 [99-36138, 00-35955] (hh) [00-35955 99-36138]

6/13/01 Calendar check performed [99-36138, 00-35955] (rei) [00-35955 99-36138]

6/21/01 Calendar materials being prepared. [99-36138, 00-35955] (rei) [00-35955 99-36138]

7/9/01 CALENDARED: Seattle Sep. 10, 2001 1:30 PM Courtroom Park Place; 21st Floor ** session to start at 9:30 am ** [99-36138, 00-35955] (rei) [00-35955 99-36138]

9/10/01 Notice of Appearance for Appellees by William W. Mercer [99-36138, 00-35955] (ss) [00-35955 99-36138]

9/10/01 ARGUED TO Alex KOZINSKI, Ronald W. GOULD, William W. Schwarzer;

SUBMISSION DEFERRED. [99-36138, 00-35955] (ss) [00-35955 99-36138]

9/13/01 Received from Bredon J. Rohan in 99-36138 and 00-35955 letter dated 9/13/01 re: parties jointly agreeing additional time is necessary for settlement discussions; respectfully requesting until 9/28/01 for submission of case for decision. [99-36138, 00-35955] (ss) [00-35955 99-36138]

3/13/02 Filed order (Alex KOZINSKI, Ronald M. GOULD, William W. Schwarzer): This case is submitted for decision. [99-36138, 00-35955] (hh) [00-35955 99-36138]

3/13/02 Case deemed submitted on this date to Alex KOZINSKI, Ronald M. GOULD, William W. Schwarzer. (See previous deferral of submission.) Order filed: 3/13/02. [99-36138, 00-35955] (hh) [00-35955 99-36138]

3/13/02 FILED OPINION: AFFIRMED IN PART and REVERSED IN PART. No costs. (Terminated on the Merits after Oral Hearing; Affirmed (in part) and Reversed (in part); Written, Signed, Published. Alex KOZINSKI, author; Ronald M. GOULD; William W. Schwarzer.) FILED AND ENTERED JUDGMENT. [99-36138, 00-35955] (hh) [00-35955 99-36138]

4/4/02 MANDATE ISSUED [99-36138, 00-35955] (hh) [00-35955 99-36138]

4/22/02 Filed order (Deputy Clerk: hh) The mandate, having been issued prematurely, is



hereby RECALLED. [99-36138, 00-35955] (hh) [00-35955 99-36138]

4/22/02 Filed appellee Jeff Groh's motion for a 14-day ext of time within which to file a petion for rehearing and rehearing en banc (to 5/13/02); declaration of Victoria L. Francis; served on 4/19/02 [4414903] (to AUTHOR) (hh) [00-35955 99-36138]

4/30/02 Filed order (Alex KOZINKSI): Aples' motion for ext of time to file a petition for rehearing and rehearing en banc until 5/13/02, is GRANTED. [99-36138, 00-35955] (hh) [00-35955 99-36138]

5/13/02 [4430536] Filed original and 50 copies Appellee Jeff Groh, Butte-Silver Bow Cty petition for rehearing with suggestion for rehearing en banc 13 pages, served on 5/13/02 PANEL & ALL ACTIVE JUDGES [99-36138, 00-35955] (ru) [00-35955 99-36138]

5/20/02 Filed order (Alex KOZINSKI): Aplts are ordered to file a response to the petition for rehearing. The response is not to exceed 15 pages, and must be filed no later than 21 days from the date of this order. [99-36138, 00-35955] (hh) [00-35955 99-36138]

6/10/02 Filed Appellants opposition to federal appellee petition for en banc rehearing, served on 6/7/02 (PANEL & ALL ACTIVE JUDGES) [99-36138, 00-35955] (ru) [00-35955 99-36138]

| | |
|---|---|
| 7/25/02 | Filed order and amended opinion (Judges Alex KOZINSKI, Ronald M. GOULD, William W. Schwarzer) (Orig. opinion id: [4383878-1] in 99-36138, [4383878-1] in 00-35955) The opinion filed 3/13/02, is amended as follows: ...(see opinion). With these amendments, the petition for rehearing is DENIED and the petition for rehearing en banc is REJECTED. AFFIRMED IN PART AND REVERSED IN PART. No costs. [99-36138, 00-35955] (hh) [00-35955 99-36138] |
| 8/2/02 | MANDATE ISSUED [99-36138, 00-35955] (hh) [00-35955 99-36138] |
| 10/23/02 | Received letter from the Supreme Court dated 10/11/02 re: The application for an ex.tm within which to file a petition for a writ of certiorari in the above entitled case has been presented to Justice O'Connor, who on 10/11/02, extended the time to and including 11/22/02. (Casefile) [99-36138, 00-35955] (gva) [00-35955 99-36138] |
| 12/6/02 | Received notice from Supreme Court: petition for certiorari filed Supreme Court No. 02-811 filed on 11/22/02. (CASEFILE) [99-36138, 00-35955] (ru) [00-35955 99-36138] |
| 3/7/03 | Received notice from Supreme Court, petition for certiorari GRANTED on March 3, 2003. Supreme Court No. 02-811 (CASEFILE) (ru) [00-35955 99-36138] |



VINCENT J. KOZAKIEWICZ
P.O. Box 588
Dillon, Montana 59725
(406) 683-5874
Attorney for Plaintiffs

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BUTTE DIVISION

| | |
|---|---|
| JOSEPH R. RAMIREZ,<br>JULIA L. RAMIREZ,<br>JOSHUA RAMIREZ, and<br>REGINA RAMIREZ,<br><br>Plaintiffs,<br><br>-v-<br><br>COUNTY OF BUTTE-SILVER BOW,<br>JOHN MCPHERSON, SHERIFF OF<br>BUTTE-SILVER BOW COUNTY,<br>JOE LEE, UNDERSHERIFF OF<br>BUTTE-SILVER BOW COUNTY,<br>JEFF GROH, SPECIAL AGENT WITH<br>THE BUREAU OF ALCOHOL, TOBACCO,<br>AND FIREARMS, and JOHN DOES 1-50,<br>named in their individual and/or<br>official capacities,<br><br>Defendants. | ) No.<br>) CV-99-17-<br>) BU-DWM<br>)<br>)<br>)<br>) COM-<br>) PLAINT<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) |

For their complaint against defendants, Plaintiffs allege:

1. This is an action for damages brought pursuant to Title 42 U.S. Code § 1983 for violations of certain protections

guaranteed by the First, Fourth, Fifth, Ninth and Fourteenth Amendments of the federal Constitution, and related state common law claims, by the defendants under color of law in their capacity as Sheriff, John McPherson, Undersheriff, Joe Lee, and as officers and deputies of the Butte-Silver Bow Sheriff's Department or Police Department, John Does 1-25.

2. Plaintiffs bring this action against Jeff Groh, a federal special agent for the Bureau of Alcohol, Tobacco and Firearms and John Does 26-50, federal agents with the Bureau of Alcohol, Tobacco and Firearms, pursuant to Title 28 U.S. Code § 1331, in claims arising from violations of federal constitutional rights guaranteed in the First, Fourth, Fifth, Ninth and Fourteenth amendments to the U.S. Constitution and redressable pursuant to *Bivens v. Six Unknown Narcotics Agents*, 403 U.S. 388 (1971).

PARTIES

3. Plaintiffs, Joseph, Julia, a/k/a Judy, Joshua and Regina Ramirez are residents of Butte-Silver Bow County, Montana residing in the family home on the Techinnah Ranch.

4. Plaintiffs are members of the Techinnah Apostolic Ministries, an unincorporated church association and as part of its ministry, provides shelter for abused or widowed women and fatherless children of the faith.

5. Defendant, Butte-Silver Bow County is a political subdivision of the State of Montana.

6. Defendant, John McPherson is and was at the times referred to below, the elected Sheriff of Butte-Silver Bow County and policy maker for the County regarding law enforcement.



7. Defendant, Joe Lee is and was at all times referred to below the duly appointed Undersheriff of Butte-Silver Bow County.

8. Defendants, John Does 1-25 were at all times referred to below duly appointed policemen or Sheriff's Deputies of Butte-Silver Bow County. Their names will be added by amendment after Defendants identify them in discovery.

9. Defendant Jeff Groh is and was at the times referred to below a special agent with the United States Bureau of Alcohol, Tobacco and Firearms.

10. Defendants, John Does 26-50 were at all times referred to below agents of the United States Government. Their names will be added by amendment after Defendants identify them in discovery.

11. All Defendants, except Butte-Silver Bow County are named in their individual capacities. The sheriff, undersheriff, and John Does 1-25 are also named as well in their official capacities.

FACTS COMMON TO ALL CLAIMS

12. Plaintiffs are residents of Butte-Silver Bow County, Montana, residing in their home located on the Techinnah Ranch near the Moose Creek exit off Interstate 15 in Butte-Silver Bow County. Joseph Ramirez is the leader of the Techinnah Ministries and disabled in that he has an artificial leg. Mr. Ramirez was in a Seattle, Washington Veteran's Hospital on March 4, 1997, receiving a new artificial leg.

13. On March 4, 1997, Judy Ramirez came out of her bedroom and found Defendant, Jeff Groh and several other unknown defendants in the kitchen of her home. Defendant, Jeff Groh told Judy Ramirez that they were there to search

her home and produced an alleged search warrant. (attached as Exhibit A and incorporated herein by reference)

14. The alleged search warrant was facially invalid in that it stated that a two story residence was concealed on the ranch! The alleged warrant did not authorize a search for or seizure of anything else.

15. Based on the alleged warrant, Defendant Jeff Groh and other unknown defendants, searched through the entire Ramirez residence, opening drawers, drawing diagrams of the interior, recording serial numbers of firearms and making other written or photographic records. Nothing was put back and in the course of the search, items of personal property were broken. Judy Ramirez was not allowed to leave the home and was followed wherever she went in the home. None of the other Defendants made any attempt to prevent the entry into the Ramirez home even though the alleged warrant did not authorize such entry.

16. While several defendants were engaged in the search of the Ramirez family home, Defendant, Joe Lee and several other defendants entered into the Ramirez's motor home and outbuildings on the ranch rummaging through personal items. None of the other Defendants made any attempt to prevent the entry into the Ramirez motor home and outbuildings even though the alleged warrant did not authorize such entry.

17. Defendant, Joe Lee and several other defendants entered the silver barn and told two minor children, Michael and Mary Noyce to stay in the barn and not move. These children were interrogated by the Defendants about the children's life on the ranch. None of the other Defendants made any attempt to prevent the entry into the barn even though the alleged warrant did not authorize such entry.



18. The illegal search of the ranch, Ramirez home, Ramirez motor home and outbuildings lasted several hours. No arrests were made nor any items seized from the property except for pictures, notes and sketches made by the defendants.

19. One or more of the Defendants contacted the news media, prior to the raid on the ranch. The television cameras were on scene at the time the Defendants arrived and a story about the raid appeared on the evening news. The local newspaper also ran a story on the raid.

20. Joseph Ramirez received a letter from his bank, postmarked several days after the raid, stating that he was to make an appointment to come to the bank and close his accounts. He was advised that he must make an appointment and if he showed up unannounced, law enforcement would be called.

21. Butte-Silver Bow authorities are engaged in a pattern and practice of conducting searches in violation of federal and state constitutional mandates.

## PRIOR CONTACT WITH DEFENDANTS

22. In May, 1996, defendant, Jeff Groh contacted Joseph Ramirez. He told Mr. Ramirez that he had heard numerous rumors about the Techinnah Ranch and wanted to visit. Mr. Ramirez invited Jeff Groh to come to the ranch. During that visit Mr. and Mrs. Ramirez showed him around the ranch, discussed the ministry and showed Mr. Groh his gun collection. The Ramirez's were led to believe that they had cleared up any rumors and thought the matter was ended.

23. In December of 1996, Mr. Ramirez was asked to come and talk with Butte-Silver Bow authorities and Department of Family Service workers. They allegedly were investigating rumors of child abuse. Mr. Ramirez met, in

Butte with the authorities, answered their questions, explaining how the ranch was run and that he teaches that children should be raised according to biblical principles. He stressed that all persons on the ranch try to live in accordance with biblical principles. Mr. Ramirez referred any other questions to his attorney, Vincent J. Kozakiewicz. Deputy County Attorney, Brad Newman advised that there was no probable cause to go onto the ranch and the Ramirez's again believed the matter was over.

FIRST CLAIM FOR RELIEF

24. Based upon the foregoing, the actions of Defendants, constituted an invasion of Plaintiffs' right to be secure in their person, houses, papers, and effects against unreasonable searches and seizures, in violation of the Fourth and Fourteenth Amendments to the United States Constitution.

25. For the foregoing reasons, Defendants, Butte-Silver Bow, John McPherson, Joe Lee, and John Does 1-25, acting under color of state and/or federal law, are liable to Plaintiffs pursuant to 42 U.S.C. § 1983 or *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed. 2d 619 (1971) for compensatory damages in such amounts as the proof may show.

26. For the foregoing reasons, Defendants, Jeff Groh and John Does 26-50, acting under color of federal law are liable to Plaintiffs pursuant to *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed. 2d 619 (1971) for compensatory damages in such amounts as the proof may show.

SECOND CLAIM FOR RELIEF

27. By contacting the news media prior to the raid that falsely accused the Plaintiffs of criminal activity when the



Defendants knew or should have known that the alleged warrant was invalid, violated Plaintiffs' right to due process of law for the news release by Defendants damaged Plaintiffs' credit standing and reputation and put pressure on Plaintiffs to counter the false charges and had a serious effect upon Plaintiffs' public and professional standing and the willingness of businesses to do business with them.

28. For the foregoing reasons, Defendants, Butte-Silver Bow, John McPherson, Joe Lee, and John Does 1-25, acting under color of state and/or federal law, are liable to Plaintiffs' pursuant to 42 U.S.C. § 1983 or *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed. 2d 619 (1971) for compensatory damages in such amounts as the proof may show.

29. For the foregoing reasons, Defendants, Jeff Groh and John Does 26-50, acting under color of federal law are liable to Plaintiffs pursuant to *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed. 2d 619 (1971) for compensatory damages in such amounts as the proof may show.

THIRD CLAIM FOR RELIEF

30. Based on the foregoing, Defendants conducted an invasions of Plaintiffs' right to privacy as guaranteed by the Ninth Amendment to the United States Constitution.

31. For the foregoing reasons, Defendants, Butte-Silver Bow, John McPherson, Joe Lee, and John Does 1-25, acting under color of state and/or federal law, are liable to Plaintiffs pursuant to 42 U.S.C. § 1983 or *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed. 2d 619 (1971) for compensatory damages in such amounts as the proof may show.

32. For the foregoing reasons, Defendants, Jeff Groh and John Does 26-50, acting under color of federal law are liable to Plaintiffs pursuant to *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed. 2d 619 (1971) for compensatory damages in such amounts as the proof may show.

FOURTH CLAIM FOR RELIEF

33. Based on the foregoing, Defendants conducted an invasion of Plaintiffs' right to privacy as guaranteed by Article II, Section 10 of the Constitution of the State of Montana.

34. For the foregoing reasons, Defendants, John McPherson, Joe Lee and John Does 1-25 are liable to Plaintiffs for compensatory damages in such amounts as the proof may show.

FIFTH CLAIM FOR RELIEF

35. Based upon the foregoing, the actions of Defendants, constituted an invasion of Plaintiffs' right to be secure in their person, houses, papers, and effects against unreasonable searches and seizures, in violation of Article II, Section 11 of the Constitution of the State of Montana.

36. For the foregoing reasons, Defendants, John McPherson, Joe Lee and John Does 1-25 are liable to Plaintiffs for compensatory damages in such amount as the proof may show.

SIXTH CLAIM FOR RELIEF

37. The actions of the Defendants and the resulting publicity has caused Plaintiffs to be viewed with suspicion and has chilled their religious expression and witnessing to others, and thereby deprived Plaintiffs of their rights to free



expression guaranteed by the First Amendment of the United States Constitution.

38. For the foregoing reasons, Defendants, Butte-Silver Bow, John McPherson, Joe Lee, and John Does 1-25, acting under color of state and/or federal law, are liable to Plaintiffs pursuant to 42 U.S.C. § 1983 or *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed. 2d 619 (1971) for compensatory damages in such amounts as the proof may show.

39. For the foregoing reasons, Defendants, Jeff Groh and John Does 26-50, acting under color of federal law are liable to Plaintiffs pursuant to *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed. 2d 619 (1971) for compensatory damages in such amounts as the proof may show.

SEVENTH CLAIM FOR RELIEF

40. Defendants have a duty to preserve law and order and provide all classes of persons with protection from constitutional violations by others.

41. Based upon the foregoing facts, Defendants breached the aforementioned duty by failing to intervene while observing other Defendants engaged in the violation of Plaintiffs' constitutional rights.

42. For the foregoing reasons, Defendants, Butte-Silver Bow, John McPherson, Joe Lee, and John Does 1-25, acting under color of state and/or federal law, are liable to Plaintiffs pursuant to 42 U.S.C. § 1983 or *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed. 2d 619 (1971) for compensatory damages in such amounts as the proof may show.

43. For the foregoing reasons, Defendants, Jeff Groh and John Does 26-50, acting under color of federal law are liable to Plaintiffs pursuant to *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed. 2d 619 (1971) for compensatory damages in such amounts as the proof may show.

EIGHTH CLAIM FOR RELIEF

44. Based on the foregoing, the individual Defendants acted with malice and oppression as defined by Montana law, for which they are liable to Plaintiffs for exemplary damages pursuant to 42 U.S.C. § 1983, *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed. 2d 619 (1971) and Montana law.

DAMAGES

45. Since the incident on March 4, 1997, Mrs. Ramirez has been afraid to stay in her own home on the ranch. She has difficulty sleeping and becomes afraid whenever an unfamiliar vehicle comes down the road. She is in constant fear that the defendants will be coming any minute to kill her or her family. Joseph Ramirez has had to live with his wife's distress on a daily basis. It is particularly distressing to Plaintiffs that Defendant, Joe Lee informed Joseph Ramirez, nearly two years after the incident, that they could not expect any protection from the Butte-Silver Bow Sheriff's Department.

46. Defendants that were in the Ramirez home broke Mr. Ramirez's glass drafting table.

47. All Plaintiffs are subjected to unwanted stares in public, unwanted publicity, have had disruption to their established course of life, damage to their reputation, and damage to Joseph Ramirez's professional reputation.



48. The events above described caused Plaintiffs great humiliation, embarrassment, and mental and emotional suffering; and will in the future, continue to cause them such humiliation, embarrassment and mental and emotional suffering.

49. The events described above have had a chilling effect on Plaintiffs' expression of their First Amendment rights.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray that this honorable Court enter judgment in their favor for compensatory and exemplary damages, together with their costs and attorneys fees pursuant to 42 U.S.C. § 1988, and their court costs, and award them such other relief as this Court deems proper.

JURY DEMAND

Plaintiffs demand trial by jury

DATED this 4th day of March, 1999.

/s/Vincent J Kozakiewicz
Vincent J. Kozakiewicz
Attorney for Plaintiffs

STATE OF MONTANA )
: ss.
County of Beaverhead )

JOSEPH R. RAMIREZ, being first duly sworn, deposes and says as follows, to-wit:

That he is one of the Plaintiffs named in the foregoing Complaint; that he has read the said Complaint and that the facts and matters contained therein are true, accurate and correct to the best of his knowledge, information and belief.

/s/ Joseph R. Ramirez
JOSEPH R. RAMIREZ

Subscribed and Sworn to before me this 4th day of March, 1999.

/s/ Vincent J. Kozakiewicz
Notary Public for the State of Montana
Residing at Dillon, Montana
My commission Expires Nov. 15, 1999

STATE OF MONTANA )
: ss.
County of Beaverhead )

JULIA L. RAMIREZ, being first duly sworn, deposes and says as follows, to-wit:

That she is one of the Plaintiffs named in the foregoing Complaint; that she has read the said Complaint and that the facts and matters contained therein are true, accurate and correct to the best of her knowledge, information and belief.

/s/ Julia L. Ramirez
JULIA L. RAMIREZ



Subscribed and Sworn to before me this 4th day of March, 1999.

/s/ Vincent J. Kozakiewicz
Notary Public for the State of Montana
Residing at Dillon, Montana
My commission Expires Nov. 15, 1999

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA - BUTTE DIVISION

JOSEPH R. RAMIREZ,
JULIA L. RAMIREZ,
JOSHUA RAMIREZ, and
REGINA RAMIREZ,

Plaintiffs,

V

COUNTY OF BUTTE-SILVER BOW, JOHN MCPHERSON, SHERIFF OF BUTTE-SILVER BOW COUNTY, JOE LEE, UNDERSHERIFF OF BUTTE-SILVER BOW COUNTY, JEFF GROH, SPECIAL AGENT WITH THE BUREAU OF ALCOHOL, TOBACCO, AND FIREARMS, and JOHN DOES 1-50, named in their individual and/or official capacities,

Defendants

JUDGMENT IN A CIVIL CASE

CV-99-17-BU-DWM

_____ **Jury Verdict**. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

_XX_ **Decision by Court**. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.



IT IS ORDERED AND ADJUDGED that JUDGMENT is entered in favor of the Federal defendants and against Plaintiffs, each party to bear its own costs.

October 20, 1999
Date

LOU ALEKSICH, JR., CLERK

/s/ Mary Nieble
(By) Deputy Clerk

FILED, ENTERED and NOTED CIVIL JUDGMENT BOOK VOLUME 37 PAGE 42

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

| | | |
|---|---|---|
| JOSEPH R. RAMIREZ, JULIA L. RAMIREZ, JOSHUA RAMIREZ, and REGINA RAMIREZ | ) | |
| Plaintiffs-Appellants, | ) | C.A. 99-36138<br>C.A. 00-35955 |
| vs. | ) | |
| COUNTY OF BUTTE-SILVER BOW; et al, | ) | |
| Defendants-Appellees, | ) | |
| and | ) | |
| JEFF GROH, SPECIAL AGENT WITH THE BUREAU OF ALCOHOL, TOBACCO and FIREARMS, | ) | |
| Defendant-Appellee. | ) | |

JOINT BRIEF OF APPELLEES

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BUTTE DIVISION



BRENDON J. ROHAN
Poore, Roth & Robertson, P.C.
P.O. Box 2000
Butte, MT 59702

(406) 497-1200

ATTORNEY FOR

COUNTY OF BUTTE-SILVER BOW

SHERRY SCHEEL MATTEUCCI
United States Attorney

Deanne L. Sandholm
Assistant U.S. Attorney
U.S. Attorney's Office
100 North Park,
Suite 100
Helena, MT 59601
(406) 449-5370

ATTORNEYS FOR APPELLEE
UNITED STATES OF AMERICA

TABLE OF CONTENTS

TABLE OF AUTHORITIES ..... iv

STATEMENT OF JURISDICTION ..... 2

STATEMENT OF THE ISSUES ..... 2

STATEMENT OF THE CASE ..... 3

STATEMENT OF FACTS ..... 5

SUMMARY OF ARGUMENT ..... 9

ARGUMENT ..... 12

I. THE DISTRICT COURT CORRECTLY GRANTED SUMMARY JUDGMENT IN FAVOR OF THE FEDERAL AND COUNTY APPELLEES AS TO THE RAMIREZES' CLAIM FOR VIOLATION OF THE FOURTH AMENDMENT FOR THE REASONS THAT NO CONSTITUTIONAL VIOLATION OCCURRED AND, THAT EVEN HAD A VIOLATION OCCURRED, FEDERAL AND COUNTY APPELLEES WERE ENTITLED TO QUALIFIED IMMUNITY. ..... 12

A. Standard of Review ..... 12

B. Applicable Law - Qualified Immunity ..... 13

C. The District Court correctly concluded that no violation of the Fourth Amendment occurred. ..... 15

D. Even if Appellants stated a claim under the Fourth Amendment, the District Court properly concluded that Appellees are Entitled to Qualified Immunity. ..... 32



* * *

[all material between the ellipses omitted]

* * *

C. The district court correctly concluded that no violation of the Fourth Amendment occurred.

The district court correctly concluded that no violation of the Fourth Amendment occurred under the undisputed facts of this case. The Fourth Amendment to the United States Constitution secures the right of the people against unreasonable searches and seizures. The Ramirezes allege that the federal search warrant which authorized the search of their residence was "facially invalid" for two reasons. One, there was a typographical error in the description of the residence to be searched and two, that the items to be searched for appeared only on the face of the search warrant application/affidavit, but not on the face of the search warrant itself. See Complaint at ¶¶ 14, 24-29 (ER, Tab 5).

In typing the information onto the face of the search warrant, Agent Groh inadvertently placed part of the description of the residence in the section of the warrant reserved for the description of the property (or persons) believed to be concealed on the premises to be searched. Because of this inadvertent mistake, the face of the search warrant did not describe the property believed to be concealed. This information was clearly delineated on the face of the search warrant application/affidavit and within Agent Groh's five page affidavit to the court. The Ramirezes do not dispute that at the execution of the search warrant Agent Groh twice described the items involved in the search warrant, once to Judy Ramirez and once, by telephone, to Joseph Ramirez. Groh Aff. ¶ 7 (ER Tab 7). Additionally, it is undisputed that Agent Groh told the other participating officers of the objects of the search. Groh Aff. ¶ 6 (ER Tab

7). The Ramirezes do not dispute either their, or the Federal and County Appellees', actual knowledge of the property to be searched for and seized.

In the context of affidavits or applications submitted in support of search warrants, it is a violation of the Fourth Amendment for an affiant to knowingly, or with reckless disregard for the truth, include false statements in the affidavit. Franks v. Delaware, 438 U.S. 154, 155-156 (1978); United States v. Stanert, 762 F.2d 775 (9th Cir. 1985), amended, 769 F.2d 1410 (9th Cir. 1985), cert. denied, 475 U.S. 1026 (1986). To defeat a claim of qualified immunity in a Bivens case, the plaintiffs must make a substantial showing of deliberate falsehood or reckless disregard for the truth, such as required under Franks. See, e.g., Stanert. 762 F.2d at 781-82. The Ramirezes do not argue that the facts as presented in the search warrant affidavit are incorrect, but rather argue that the search warrant itself is "facially invalid" as the residence was inadvertently described as "concealed" property. The district court correctly concluded that this inadvertent error does not rise to the level of the Fourth Amendment violation. There is no showing that Agent Groh's actions were reckless or that the inadvertent error was a "deliberate falsity." More importantly, the mistake on the face of the search warrant was harmless and did not affect the Court's probable cause determination. Indeed, the face of the search warrant application was correctly typed and included a complete description of the place to be searched and the items to be seized. See Application and Affidavit for Search Warrant, (ER Tab 2). Additionally, the affidavit attached to the application, from which the court determined probable cause, set out the specific items to be seized.

The Ramirezes argue that, because on the face of the warrant the place to be searched was listed as the ranch and the item to be seized was listed as a two-story blue house, the officers exceeded the scope of the warrant when they



searched the outbuildings and the vehicles on the property. The district court correctly determined that the search of the outbuildings and/or vehicles was not unreasonable or beyond the scope of the warrant. This determination is in complete accord with controlling authority.

This Court has expressly held that "a search warrant authorizing the search of a residence also authorizes without so stating the search of the residence's curtilage." United States v. Gorman, 104 F.3d 272 (9th Cir. 1996). This Court additionally has indicated that a "curtilage is simply an extension of the residence's living area, and we have previously held that such extensions become a part of the residence for purposes of a search warrant." Gorman, 104 F.3d at 274-275; see also, United States v. Elliott, 893 F.2d 220, 225 (9th Cir. 1990), cert. denied, 498 U.S. 904 (1990) (search of adjacent storeroom was reasonable pursuant to a warrant which only mentioned search of an apartment). Likewise, this Court has also expressly held that searches of vehicles which are contained on the curtilage of the residence to be searched, but not mentioned in the warrant, are implicitly covered under the authority to search the curtilage. United States v. Vaandering, 50 F.3d 698, 701 (9th Cir. 1995).

There is further support for the district court's determination. Here, the five page affidavit to the search warrant application, reviewed by the court in issuing the search warrant, clearly stated that the search was to include the "residence, any outbuildings, and any vehicles registered to Ramirez which are located on the curtilage of the property." See, Affidavit in Support of Search Warrant, page 4 (ER Tab 2). The officers executing the search were all briefed by Agent Groh and had access to the affidavit as well. As such, the Ramirezes' allegations that the officers' actions were unreasonable and in violation of their rights, because the scope of the verbiage as contained only on the face of the search warrant was exceeded, is without merit and fails to

state any constitutional violation under the Fourth Amendment.

Additionally, the Ramirezes' argument that the search warrant itself is invalid since it describes the residence as "concealed" does not state a violation under the Fourth Amendment. While the Fourth Amendment requires that a search warrant particularly describe "the place to be searched, and the person or things to be seized," the test for determining the validity of a warrant is whether the warrant and affiliated documents describe the place to be searched with sufficient particularity to enable the law enforcement officers to locate and identify the premises with reasonable effort, and whether any reasonable probability exists that the officers may mistakenly search another premises. United States v. Turner, 770 F.2d 1508, 1510 (9th Cir. 1985).

In this case, the residence is clearly and accurately described on both the face of the search warrant application/affidavit, as well as within Agent Groh's five page affidavit to the court. Additionally, Agent Groh had been to the Ramirezes' residence before applying for the search warrant. See Complaint at ¶ 22 (ER Tab 5). When Agent Groh presented the search warrant affidavit to the court, he accurately communicated to the judge the description of the place to be searched and the items to be seized. After the warrant was signed, the officers and agents were briefed on the location of the residence and the items which were the objects of the search. They located and searched the correct residence and informed the Ramirezes of the place to be searched and the property to be seized. In similar circumstances, this Court has expressly provided that no Fourth Amendment violation exists. See, Turner, 770 F.2d at 1511 (upholding validity of warrant that described house to be searched with sufficient particularity despite an incorrect address on the face of the warrant).



Finally, the Ramirezes argue that the search warrant itself is invalid because the specific items to be searched for do not appear on the face of the warrant. This Court has stated that "to pass constitutional muster, a warrant 'must be specific enough to enable the person conducting the search reasonably to identify the things authorized to be seized.'" United States v. McGrew, 122 F.3d 847, 849 (9th Cir. 1997) (citing United States v. Sollotro, 800 F.2d 959, 963 (9th Cir. 1986)).[1] The purpose of the warrant is not only to "limit the officer's discretion," but also to "inform the person subject to the search what items the officers executing the warrant can seize." See United States v. Hayes, 794 F.2d 1348, 1355 (9th Cir. 1986),[2] cert. denied, 479 U.S. 1086 (1987) rehearing denied, 481 U.S. 1043 (1987).

In this instance, the face of the search warrant did not include the items that appellees were authorized to seize. However, these items were orally described to the Ramirezes, and were provided through the face page of the Application and Affidavit for Search Warrant. Groh Aff. ¶¶ 7, 9 (ER Tab 7). Therefore, the issue is whether or not the purpose of the warrant requirement was met in this instance by the oral and written communication of the correct information to both the agents executing the warrant as well as the Ramirezes.

The district court correctly concluded that no constitutional violation occurred in this case. Order at 8-11 (ER Tab 9). Although the Ramirezes were able to point to

---

[1] See also United States v. Kow, 58 F.3d 423, 427 (9th Cir. 1995), United States v. Robertson, 833 F.2d 777, 783 (9th Cir. 1987), United States v. Hotal, 143 F.3d 1223, 1226 (9th Cir. 1998).

[2] See also United States v. Van Damme, 48 F.3d 461, 466 (9th Cir. 1995), see also United States v. Gantt, 194 F.3d 987 (9th Cir. 1999) (failure to show particularized warrant to plaintiff prior to search failed to give her notice as to what could be seized), see also United States v. Choi, 1999 U.S. App. LEXIS 10664, 5 (9th Cir. 1999) (Agents required to leave warrant with plaintiff, warrant includes anything Agents relied upon during their search.).

errors on the face of the warrant, there was no dispute that, at the time of the execution of the search warrant, (1) participating officers were aware of the premises to be searched and the objects of the search, and (2) the Ramirezes were aware of the premises to be searched and the objects of the search. Therefore, the purpose of the particularity requirement was met in this case.

The purpose of the particularity requirement is to make general searches impossible. United States v. Towne, 997 F.2d 537, 548 (9th Cir. 1993) (quoting United States v. Holzman, 871 F.2d 1496, 1508 (9th Cir. 1989)). When the magistrate issuing the warrant is apprised of the scope of the search and can make the determination that probable cause is established, when the officers are aware of the items to be seized, and when the person being searched has notice of the items to be seized, the risk of a general search is eliminated. United States v. Towne, 997 F.2d at 548.

When a warrant "fails to offer sufficiently detailed instruction and instead leaves [the officers conducting the search] guessing as to their task," the warrant is facially deficient. United States v. Towne, 997 F.2d at 549.[3] However, this defect may be cured by proof that the affiant himself was present at the execution of the warrant. See United States v. Luk, 859 F.2d 667, 677 (9th Cir. 1988). This defect may also be cured by evidence that specific information was relied upon by the magistrate and the officers who signed the warrant. United States v. Towne,

[3] The Ninth Circuit has revisited the issue of the good faith exception since Towne. In Van Damme, the court stated that "[t]he warrant need not necessarily describe the things to be seized, if the application for it does, and the officers executing the warrant have the application with them," since then the officers can refer to it and show it to the person to be searched. See United States v. Van Damme, 48 F.3d 461, 466 (9th Cir. 1995).



997 F.2d at 550 n.6.[4] In Luk, the Ninth Circuit considered, as evidence of the officers' good faith, their reliance on an affidavit where the affiant was present and supervising the search, even though the affidavit was not expressly incorporated into the warrant by reference and may not have been in the hands of the executing officers during the search. Luk, 859 F.2d at 677 & n.10; see also, Towne, 997 F.2d at 550 n.6. Here, just as in Luk, the affiant, Agent Groh, was present and directed the search for items specified with particularity in the search warrant application/affidavit.

Urging reversal on the grounds that the district court erred in concluding that no Fourth Amendment violation occurred, the Ramirezes rely heavily on United States v. McGrew, 122 F.3d 847. Appellants' Brief at 10-18. In McGrew, this Court reiterated the proposition that search warrants must be sufficiently particular in order to safeguard "the right to be free from unbounded, general searches" and that they lack sufficient particularity when they fail to specify the items to be seized. Id., at 849 (citation omitted); see United States v. Kow, 58 F.3d 423, 427 (9th Cir. 1995); United States v. Robertson, 833 F.2d 777, 783 (9th Cir. 1987); United States v. Hotal, 143 F.3d 1223, 1226 (9th Cir. 1998).

While the Ninth Circuit has distinguished the Luk/Towne analysis in two recent cases, McGrew[5] and United States v. Kow, these cases are distinguishable. First, in Kow, the Court rejected the defendants' good faith reliance on a facially invalid warrant, noting that the description of the items to be searched was "too broad." Kow, 58 F.3d at 429-

[4] However, the presence of an affiant will not cure an overbroad affidavit since his presence and reliance on an overbroad affidavit will not cure the specificity problem. See United States v. Kow, 58 F.3d 423, 429 (9th Cir. 1995), see also Center Art Galleries-Hawaii, Inc. v. United States, 875 F.2d 747, 750 (9th Cir. ____).

[5] The search of the ranch occurred on March 4, 1997, prior to the McGrew decision. McGrew was decided on August 8, 1997 and filed September 12, 1997. McGrew, 122 F.3d at 847.

430. However, in holding that the defendants could not in good faith rely on the underlying affidavit, the court first noted that "unlike the facts in Luk, there is absolutely no evidence in this case that the officers who executed the warrant, although instructed to read the warrant, actually relied on the information in the affidavit to limit the warrant's overbreadth." Kow, 58 F.3d at 429. Therefore, the test is whether or not there was "the level of guidance necessary to cure a facially invalid warrant." Kow, 58 F.3d at 429-430 (emphasis added).

In McGrew, the government contended that the generalized warrant was cured by a more particularized and incorporated affidavit, but refused to provide a copy of the affidavit delineating the items to be seized at any time prior to trial, and contended that they had no obligation to do so. McGrew, 122 F.3d at 849. Ultimately, the Ninth Circuit first held that the warrant could not be cured by an affidavit which was not provided or attached with the search warrant. McGrew, 122 F.3d at 849-850. Secondly, the Ninth Circuit held that the "good faith" exception to the exclusionary rule was not available to the defendants because there was not an "objective reasonable basis for the mistaken belief that the warrant was valid." McGrew, 122 F.3d at 850 (internal citation omitted). Additionally, as the Ramirezes point out, McGrew rejected Towne, which would allow the good-faith exception when the agent was present, because (1) the affidavit was not "attached" to the warrant, and (2) the person being searched was unaware of the limits of the search. However, in McGrew the government intentionally withheld the particularized affidavit, even up to and during the suspect's criminal prosecution. McGrew, 122 F.3d at 849. That was not the case here. Agent Groh provided the detailed list of items to be seized upon request.

As the district court correctly determined, both McGrew and Kow are distinguishable under the facts of this case. In McGrew, there was no indication that the officers involved in



the search provided the residents of the searched home any description of the items to be seized before, during or after the search. In McGrew, the warrant referred to the affidavit's list of items to be seized, but the affidavit did not accompany the warrant and, even after the search, the officers refused to reveal any portion of the affidavit to the home's owners. In Kow, the description of the items to be seized in the warrant as well as the application were overbroad and the application, therefore could not cure the warrant's deficiencies. United States v. Kow, 58 F.3d at 429-30. As the district court noted:

> The Ninth Circuit panel deciding McGrew was faced with a police force that stubbornly insisted the persons whose home was searched had no interest in independently ascertaining the particular description of the place to be searched or items to be seized. Hence, McGrew emphasized:
>
> > The purpose of the accompanying affidavit clarifying a warrant is both to limit the officer's discretion and to inform the person subject to the search what items the officers executing the warrant can seize. . . . Because the agents never served a copy of the affidavit on McGrew, the second goal was entirely unsatisfied here. Neither, in all likelihood, was the first; this court has held expressly that "neither purpose is served" when the affidavit fails to accompany the warrant.
>
> McGrew, 122 F.3d at 850 (quoting United States v. Hayes, 794 F.2d 1348, 1355 (9th Cir. 1986).
>
> Likewise, in United States v. Kow, 58 F.3d 423 (9th Cir. 1995), the description of items to be seized in both the warrant and the application were overbroad. Id. at 429-430. Thus, the application could not cure the warrant's overbreadth.

Order at pp 9-10 (ER Tab 9).

By contrast in the present case, the purposes of the particularity requirement, i.e., to limit the officer's discretion as to what can be seized and to inform the person subject to the search what items can be seized, were met. The Ramirezes did not contest the fact that they were orally informed of the items to be seized and that the face page of the Application and Affidavit for Search Warrant was immediately faxed to their counsel, showing the correct description of items to be seized. The officers executing the search warrant were informed of the items to be seized. The purposes of the particularity requirement were met without the need for the affidavit, so there was no requirement that the affidavit accompany the warrant. See, e.g., United States v. Hillyard, 677 F.2d 1336 (9th Cir. 1982) (holding that search warrant may be construed with reference to application if application accompanies warrant and warrant incorporates application but not requiring application to accompany warrant in all cases).

Legally, the decisions of Kow and McGrew are distinguishable from the present case. In these cases plaintiffs were attempting to use the exclusionary rule to exclude evidence and defendants were opposing exclusion under the good-faith exception. These were evidence battles, not Bivens-type claims. See McGrew, 122 F.3d at 848, see Kow, 58 F.3d at 425. Moreover, the Supreme Court views the exclusionary rule as a punishment for law enforcement officers, not a right of action for Bivens plaintiffs. It held in United States v. Leon, 468 U.S. 897 (1984):

> The [exclusionary] rule thus operates as "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." United States v. Calandra, 414 U.S. 338, 354 (1974).



Id. at 906 (emphasis added). In fact, "[t]he question whether the exclusionary rule's remedy is appropriate in a particular context has long been regarded as an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct." Illinois v. Gates, 462 U.S. 213, 223 (1983), citing United States v. Havens, 446 U.S. 620 (1980); United States v. Ceccolini, 435 U.S. 268 (1978); United States v. Calandra, supra; Stone v. Powell, 428 U.S. 465 (1976). Therefore, it is important to note that this is not a typical exclusionary rule evidence case, but rather a monetary damages, Bivens-type case.[6]

Finally, the fact that the search warrant affidavit/application was not left with the Ramirezes was harmless error, as no property was seized from their residence. See, e.g., United States v. Baker, 888 F. Supp. 1521, 1531 (D. Haw. 1995), vacated and remanded on other grounds, 108 F.3d 339 (9th Cir. 1997) ("In this case, the court finds that no violation occurred, because the agents left a copy of the warrant at Baker's residence. However, even if they failed to do so, the violation would only be non-fundamental in nature"). Thus this case is distinguishable from both McGrew and Kow. See Order at p. 10 (ER Tab 9).

The Ramirezes argue on appeal that the search was overbroad because serial numbers of firearms were recorded and photos were taken. However, neither of these events is considered a seizure. The recording of serial numbers is not a seizure in that it does not "meaningfully interfere" with the person's possessory interest in either the serial numbers or

---

[6] The Ramirezes argue that holding persons personally liable for constitutional violations is the only effective means of deterring future constitutional violations because the exclusionary rule "has been rendered impotent with the creation of civil forfeiture statutes." Appellants Brief at p. 29. It is not clear what relevance this argument has to the facts of this case as there were no items seized or charges brought against the Ramirezes.

the item from which the serial number is taken. Arizona v. Hicks, 480 U.S. 321, 324 (1987) (citing Maryland v. Macon), 472 U.S. 463, 469 (1985). The officer recording the serial numbers, however, is required to have a lawful right of access to the objects themselves. See Horton v. California, 496 U.S. 128, 137 (1990). In this case, the United States Magistrate issued a search warrant for unlawful firearms and explosive devices which necessitated a search of the premises. Therefore the officers had a right to view the firearms on the premises and the recording of the serial numbers was lawful. The recording of the serial numbers was not a violation of Ramirezes' Fourth Amendment rights and the actions of the Federal and County Appellees in recording the serial numbers were objectively reasonable.

The Ramirezes also argue that taking photographs of the interior of their home was a violation of their constitutional rights and that the Federal and County Appellees should have stopped these actions from occurring. However, the taking of photographs of areas in plain view during a lawful search is considered to be within the scope of the warrant. Bills v. Aseltine, 958 F.2d 697, 707 (6th Cir. 1992). On the basis of the reasoning in Arizona, wherein the Supreme Court determined that the recording of serial numbers does not meaningfully interfere with any possessory interest, the Bills court held that recording visual images of a scene by means of photography also does not meaningfully interfere with any possessory interest. Id. at 707. When officers are properly on the premises, they can record scenes presented in their plain view. Id. The taking of photographs of the interior of the Ramirezes' home, therefore, was not a violation of their Fourth Amendment rights. There is also an important policy reason for the taking of photographs. Pursuant to Department of Treasury, Bureau of Alcohol, Tobacco and Fireamrs, ORDER-AFT 0 3220.1, pre-search photos are to be taken of the premises and, where practical post-search photographs are to be taken. The photos are to record the condition of the premises before and after the search and



location of physical evidence. The taking of photographs in this instance was simply not a violation of the Ramirezes' constitutional right.

The Ninth Circuit has "expressly and repeatedly warned against taking 'an overly technical view of the validity of search warrants and the application of the exclusionary rule . . . a realistic and pragmatic approach to the exclusionary rule is required' by the Supreme Court's decisions in this area." See Towne 997 F.2d at 549 (citations omitted). Such a pragmatic approach is equally warranted in this case. The district court correctly determined that there was no Fourth Amendment violation in this case.

* * *

[all material from here to end of document omitted]

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543

March 3, 2003

Mr. Richard A. Cordray
4900 Grove City Road
Grove City, Ohio 43123

Re: Jeff Groh v. Joseph R. Ramirez, et al.
No. 02-811

Dear Mr. Cordray:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is granted.

Sincerely,

/s/ William K. Suter

William K. Suter, Clerk